LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
AUG 26 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1965

No. 500

William S. Halpern and Louis N. Seltzer, d/b as
BURLINGTON BROADCASTING COMPANY,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,
WEST JERSEY BROADCASTING COMPANY,
and
JOHN C. GIORDANO,
Receiver of the Assets of Mount Holly-
Burlington Broadcasting Co., Inc.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Morton H. Wilner
Arthur Scheiner
Counsel for William S. Halpern and Louis N. Seltzer, d/b as Burlington Broadcasting Company

Wilner & Bergson
1343 H Street, N.W.
Washington, D. C. 20005
Of Counsel

INDEX

OPINION BELOW 2
JURISDICTION 2
QUESTION PRESENTED 2
STATUTE INVOLVED 2
STATEMENT 3
REASONS FOR GRANTING THE WRIT 6
CONCLUSION 9
APPENDICES:
Appendix A 11
Appendix B 13
Appendix C 14
Appendix D 15

CITATIONS

Cases:

Ashbacker Radio Corp. v. Federal Communications Commission, 326 U.S. 327, 333 (1945) 6
Burlington Truck Lines v. United States, 371 U.S. 167 7
Century Broadcasting Corp. v. FCC, 114 U.S. App. D.C. 59, 310 F.2d 864 6
Federal Communications Commission v. Taft B. Schreiber, Case No. 482, October Term 1964, Supreme Court of the United States, decided May 24, 1965 6
Fort Harrison Telecasting Corp. v. FCC, 111 U.S. App. D.C. 368, 297 F.2d 779 6
KFAB Broadcasting Co. v. FCC, 85 U.S. App. D.C. 160, 177 F.2d 40 6
Mid-Florida Television Corp. v. FCC (Case No. 204) filed June 1, 1965 8
Plains Television Corp. v. FCC, 108 U.S. App. D.C. 20, 278 F.2d 854 6
Ranger v. FCC, 111 U.S. App. D.C. 44, 294 F.2d 240 6

Saint Louis Amusement Co. v. FCC, 104 U.S. App. D.C. 45, 259 F.2d 202, cert. den. 358 U.S. 894 6

Securities & Exchange Commission v. Chenery Corp., 318 U.S. 80 7

Telegraph Herald Co. v. Federal Radio Commission, 62 App. D.C. 240, 66 F.2d 220 6

WJR, The Goodwill Stations v. Federal Communications Commission, 337 U.S. 265, 272 (1949) 6

Statutes:

Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. 1001 . . . . . 2, 8

Communications Act of 1934, as amended, 48 Stat. 1064 as amended 47 U.S.C. 151
Section 402(g) 2, 8
Section 402(h) 2, 7, 8

IN THE

Supreme Court of the United States

OCTOBER TERM 1965

No. _____

William S. Halpern and Louis N. Seltzer, d/b as
BURLINGTON BROADCASTING COMPANY,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,
WEST JERSEY BROADCASTING COMPANY,
and
JOHN C. GIORDANO,
Receiver of the Assets of Mount Holly-
Burlington Broadcasting Co., Inc.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

William S. Halpern and Louis N. Seltzer, d/b as Burlington Broadcasting Company (hereinafter referred to as "Burlington Broadcasting"), respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on March 17, 1965.

OPINION BELOW

The Order of the Court of Appeals is unreported and is reproduced herein as Appendix A.

JURISDICTION

The judgment of the Court of Appeals was entered on March 17, 1965. Petitions by the Federal Communications Commission for Rehearing and by Burlington Broadcasting for Rehearing, Or in the Alternative for Rehearing *en banc* were denied by separate Orders of the Court of Appeals on May 28, 1965, and are reproduced herein as Appendices B and C, respectively. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Court of Appeals properly exercised its judicial authority to review decisions of the Federal Communications Commission when it —

(1) Denied the Commission's Motion which proposed to issue a decision granting the application of Burlington Broadcasting which had been found fully qualified to be a licensee; and

(2) Directed that new applications be entertained by the Commission; and

(3) Directed the Commission to grant an application for the assignment of the facilities to a Receiver.

STATUTE INVOLVED

The pertinent portions of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 151, and the Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. 1001, are set forth in Appendix D, *infra*.

STATEMENT

On November 18, 1958, Burlington Broadcasting filed an application for a new standard broadcast station in Burlington, New Jersey. As the Commission later found, Burlington Broadcasting was fully qualified in all respects (legally, technically and financially) to construct and operate the proposed facility in the public interest.

However, no action was taken on that application. On January 23, 1960, a competing application was filed by Burlington County Broadcasting Company; and on February 26, 1960, a second competing application was filed by John J. Farina. On February 1, 1961, the Commission designated the three applications for hearing in a consolidated proceeding. On June 14, 1963, following an evidentiary hearing and oral argument, the Commission granted the application of Farina.[1]

Thereafter, Burlington Broadcasting took an appeal on the grounds that the Commission erred in its findings and conclusions with respect to the qualifications of Farina and the merits of that application as compared with the application of Burlington Broadcasting. In an Opinion dated March 19, 1964, the Court of Appeals concluded that the Commission had failed to make or require adequate inquiry into the question of Farina's financial resources. Accordingly, the Court concluded: "We retain jurisdiction and remand for the development of a more adequate record."[2]

The Commission proceeded as ordered by the Court and the case was remanded to a Hearing Examiner on

---

[1] *William S. Halpern and Louis N. Seltzer, d/b as Burlington Broadcasting Company, et al.*, 34 F.C.C. 1135 (1963).

[2] *Halpern and Seltzer v. Federal Communications Commission*, 118 U.S. App. D.C. 28, 331 F.2d 774, *cert. den.* October 12, 1964 sub. nom. *Mount Holly-Burlington Broadcasting Company, Inc. v. Halpern and Seltzer and Federal Communications Commission*, No. 190, 379 U.S. 827.

May 1, 1964. On July 10, 1964, Farina advised the Commission that he was withdrawing from the further prosecution of the matter, claiming that one of his creditors had secured a Court Appointed Receiver, to take over the licensee corporation.[3] On July 16, 1964, the Receiver[4] requested Commission consent to the involuntary assignment to him of the construction permit. Several days later, the Receiver sought intervention in the proceedings before the Commission, claiming that he would either go forward to meet the issues pursuant to the Court's earlier remand and the proposed further hearing or that he would propose other appropriate action. The Commission authorized the Receiver to file a brief stating his position.

On September 15, 1964, a newly organized corporation, West Jersey Broadcasting Company (hereinafter referred to as "West Jersey"), which theretofore had not been a party to the proceeding and which had not in any fashion evinced any interest in the proceeding, tendered to the Commission an application for the facilities involved herein together with a request that the Commission waive its "cut-off" rules so as to permit consideration of its application in a comparative hearing with the application of Burlington Broadcasting and such other new applications as might be filed.

On September 18, 1964, the Receiver filed a brief with the Commission stating that he could not proceed under the remand issues inasmuch as Farina refused to testify voluntarily in any further hearing.

On December 10, 1964, the Commission filed a motion with the Court of Appeals for remand of the pro-

---

[3] The permit granted to Farina had been assigned by him to Mount Holly-Burlington Broadcasting Co., Inc., a corporation controlled by Farina.

[4] The Receiver is not acting generally for the benefit of all creditors but only for the National State Bank of Elizabeth, Farina's largest creditor.

ceeding for the purpose of adopting as the Commission's supplemental decision a "Report and Recommendation" setting aside its earlier grant to Farina and granting the application of Burlington Broadcasting. The decision of the Commission proposing to grant the application of Burlington Broadcasting was based on explicit findings that it is the preferred applicant and fully capable of operating these facilities in the public interest, convenience and necessity. Further, the Commission proposed to dismiss the Farina application because of his failure to prosecute his application. Finally, the Commission proposed to deny the West Jersey "Petition for Waiver" and not to accept the West Jersey application.

The Receiver and West Jersey filed motions in the Court of Appeals for leave to intervene and oppositions to the Commission's motion to remand. The Court of Appeals, acting without the benefit of briefs or oral argument, rejected the disposition of this case proposed by the Commission and granted the relief requested by West Jersey and Receiver. The Court remanded the case to the Commission with direction to: (1) reopen the record; (2) accept the application of West Jersey Broadcasting Company and any other qualified applicant for the facilities here involved; (3) allow intervention by the Receiver; (4) hold new comparative proceedings to determine which applicant is best qualified to be awarded said facilities; and (5) grant the application for assignment to the Receiver.

A Petition for Rehearing was filed by the Commission urging that the Court reconsider and grant the motion for remand or in the alternative afford opportunity for the filing of briefs and the submission of argument. Burlington Broadcasting filed a Petition for Rehearing Or in the Alternative for Rehearing *en banc* urging that the Court grant the motion for remand filed by the Commission.

In separate Orders released May 7, 1965, a panel of the Court of Appeals, with Judge Wright dissenting, de-

nied the petitions for rehearing filed by the Commission and Burlington Broadcasting (Appendix B herein); and the Court, with Judges Fahy, Danaher and Wright dissenting, denied the petition for rehearing *en banc* filed by Burlington Broadcasting. (Appendix C herein.)

REASONS FOR GRANTING THE WRIT

In this case the Commission provided the Court with the full factual background leading to its proposed "Report and Recommendation," which supported its findings that Burlington Broadcasting was the preferred applicant. The Commission had also considered the suggestion of opening the proceedings to new applicants but decided, based upon an application of its rules which had repeatedly been affirmed by the Court of Appeals [5] that no justification for such action existed.

In denying the motion of the Commission for remand so that the Commission could adopt its proposed "Report and Recommendation" granting the application of Burlington Broadcasting, this Court departed from established standards of judicial review of agency action. The decision of the Court below is directly in conflict with the decisions of this Court which make clear that the manner in which the Commission regulates and conducts its procedures is a matter of agency discretion. [6]

---

[5] *Saint Louis Amusement Co. v. FCC*, 104 U.S. App. D.C. 45, 259 F.2d 202, *cert. den.* 358 U.S. 894; *Ranger v. FCC*, 111 U.S. App. D.C. 44, 294 F.2d 240; *Century Broadcasting Corp. v. FCC*, 114 U.S. App. D.C. 59, 310 F.2d 864; *Plains Television Corp. v. FCC*, 108 U.S. App. D.C. 20, 278 F.2d 854; *Fort Harrison Telecasting Corp. v. FCC*, 111 U.S. App. D.C. 368, 297 F.2d 779; *KFAB Broadcasting Co. v. FCC*, 85 U.S. App. D.C. 160, 177 F.2d 40; *Telegraph Herald Co. v. Federal Radio Commission*, 62 App. D.C. 240, 66 F.2d 220.

[6] *Federal Communications Commission v. Taft B. Schreiber*, slip opinion Case No. 482, October Term 1964, Supreme Court of the United States, p. 9, decided May 24, 1965; *Ashbacker Radio Corp. v. Federal Communications Commission*, 326 U.S. 327, 333 (1945); *WJR, The Goodwill Stations v. Federal Communications Commission*, 337 U.S. 265, 272 (1949).

The Order of the Court was issued without opinion or explanation: That Order did, however, advert to " . . . requests for affirmative relief pursuant to Section 402(h) of the Communications Act of 1934, as amended . . .". Accordingly, it may be presumed that the Court predicated its decision on the view that the provisions of Section 402(h) conferred upon it original and plenary authority to take such action which the Court in the exercise of its discretion considered appropriate.[7] If indeed this is the basis for extraordinary action taken by the Court it is believed that this view is erroneous.[8] Section 402(h) reads as follows:

> "In the event that the court shall render a decision and enter an order reversing the order of the Commission, it shall remand the case to the Commission to carry out the judgment of the court and it shall be the duty of the Commission, in the absence of proceedings to review such judgment, to forthwith give effect thereto, and unless otherwise ordered by the court, to do so upon the basis of the proceedings already had and the record upon which said appeal was heard and determined."

---

[7] Intervenor West Jersey Broadcasting Company urged this view in its "Opposition to Motion for Remand; Request for Affirmative Relief Pursuant to Section 402(h) of the Communications Act" filed December 23, 1964, in the Court of Appeals.

[8] The only other possible explanation is that the Court held the Commission's determination to be arbitrary and capricious, or at least without any basis in the record or warrant in law. However, the Court did not even write an opinion to explain its action. Surely if administrative agencies' decisions are not permitted to stand unless the grounds upon which the agency acted are "clearly disclosed and adequately sustained," (*Securities and Exchange Commission v. Chenery Corp.*, 318 U.S. 80, 94; *Burlington Truck Lines v. United States*, 371 U.S. 156, 167-168), a determination that an agency's action is arbitrary and capricious should at a minimum advise the agency of the respects in which it has erred.

This action does not, by its terms, purport to effect any change in the scope of judicial review or to vest in this Court original jurisdiction to decide whether any new applicants should be admitted to the proceeding under review: Rather this Section confers authority on the Court for the limited purpose of insuring that the Commission give proper effect to any order of reversal which the Court may enter.

Indeed, the position which is necessarily implicit in the Order of the Court in this case is contrary to the scope of judicial review provided in Section 402(g) of the Communications Act of 1934, as amended. That section, by incorporating the provisions of Section 10(e) of the Administrative Procedure Act, in effect, limits and circumscribes the authority of the Court to reverse and set aside agency action to specified instances where error was committed. The question presented is of fundamental importance in the administration of the Communications Act of 1934, as amended, since the decision of the Court in this case is necessarily based upon an interpretation of Section 402(h) which is squarely at odds with the explicit provisions of Section 402(g) of the Communications Act and established standards of judicial review.[9]

---

[9] Related and similar questions are presented by the pending Petition for Certiorari in *Mid-Florida Television Corp. v. FCC* (Case No. 204), filed June 1, 1965.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Morton H. Wilner
Arthur Scheiner
Counsel for William S. Halpern and Louis N. Seltzer, d/b as Burlington Broadcasting Company

Wilner & Bergson
1343 H Street, N.W.
Washington, D.C. 20005
Of Counsel

August 26, 1965

APPENDIX A

Filed in the United States Court of Appeals
March 17, 1965

Before: Wilbur K. Miller, Senior Circuit Judge, Burger and Wright, Circuit Judges, in Chambers.

ORDER

On consideration of appellee's motion for remand for the issuance of appropriate orders adopting the Report and Recommendation of the Commission, released December 10, 1964, as its Supplemental Decision in this case, of the motions of West Jersey Broadcasting Company and John C. Giordano, Receiver of the assets of Mount Holly-Burlington Co., Inc., for leave to intervene for the purpose of opposing appellee's said motion, of appellants' opposition to the motions for leave to intervene, and of said movants' replies to the opposition, and

It appearing that said movants to intervene have lodged with the clerk their oppositions to appellee's motion to remand, and requests for affirmative relief pursuant to Section 402(h) of the Communications Act of 1934, as amended, and that appellants and appellee have lodged their replies to said oppositions, it is

ORDERED by the court that West Jersey Broadcasting Company, and John C. Giordano, Receiver of the assets of Mount Holly-Burlington Co., Inc., are allowed to intervene in this case, and the clerk is directed to file the aforesaid lodged pleadings herein, and upon consideration whereof, it is

FURTHER ORDERED by the court that appellee's motion for remand for the purposes indicated therein be denied, and the aforesaid intervenors' request for affirmative relief is granted, and it is

FURTHER ORDERED by the court that this case is remanded to the Federal Communications Commission with directions to: (1) reopen the record; (2) accept the application of West Jersey Broadcasting Company and any other qualified applicant for the facilities here involved; (3) allow intervention by the aforesaid receiver, and (4) hold new comparative proceedings to determine which applicant is best qualified to be awarded said facilities.

Per Curiam.

Dated: March 17, 1965

Circuit Judge Wright would grant appellee's motion to remand and deny the aforesaid motions for leave to intervene.

APPENDIX B

Filed in the United States Court of Appeals
May 28, 1965

Before: Miller, Senior Circuit Judge, Burger, and Wright, Circuit Judges, in Chambers.

ORDER

On consideration of the petitions for rehearing filed by the Federal Communications Commission and William S. Halpern and Louis N. Seltzer d/b as Burlington Broadcasting Company, and of the oppositions filed thereto by John C. Giordano and West Jersey Broadcasting Company, it is

ORDERED by the Court that the aforesaid petitions for rehearing are denied.

Per Curiam

Dated: May 28, 1965

Circuit Judge Wright would grant the petitions for rehearing.

APPENDIX C

Filed in the United States Court of Appeals
May 28, 1965

Before: Bazelon, Chief Judge, Fahy, Washington, Danaher, Burger, Wright, McGowan, Tamm, and Leventhal, Circuit Judges, in Chambers.

ORDER

On consideration of the petition for rehearing *en banc* filed by William S. Halpern and Louis N. Seltzer d/b as Burlington Broadcasting Company, and of the oppositions filed thereto by John C. Giordano and West Jersey Broadcasting Company, it is

ORDERED by the court *en banc* that appellants' aforesaid petition is denied.

Dated: May 28, 1965

Circuit Judges Fahy, Danaher, and Wright would grant appellants' petition for rehearing *en banc*.

APPENDIX D

STATUTES INVOLVED

Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. 1001 et seq.:

> Section 10(e): Scope of Review.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 151 et seq.:

> Section 402(g): At the earliest convenient time the court shall hear and determine the appeal upon the record before it in the manner prescribed by section 10(e) of the Administrative Procedure Act.

Section 402(h): In the event that the court shall render a decision and enter an order reversing the order of the Commission, it shall remand the case to the Commission to carry out the judgment of the court and it shall be the duty of the Commission, in the absence of the proceedings to review such judgment, to forthwith give effect thereto and unless otherwise ordered by the court, to do so upon the basis of the proceedings already had and the record upon which said appeal was heard and determined.